



Department of Energy
Washington, DC 20585

222396

May 19, 2008

Via E-filing


The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re STB Finance Docket No 35106
United States Department of Energy --
Rail Construction and Operation --
Caliente Rail Line in Lincoln, Nye, and
Esmeralda Counties, Nevada

Dear Secretary Quinlan.

Enclosed for filing in the above referenced matter is the United States Department of Energy's Reply to the State of Nevada's Motion for Leave to Amend Motion to Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed by Proper Supplement and Request for Oral Argument, and Certificate of Service

Sincerely,


Mary B. Neumayr
Deputy General Counsel
for Environment & Nuclear Programs



UNITED STATES OF AMERICA

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No 35106

UNITED STATES DEPARTMENT OF ENERGY
--RAIL CONSTRUCTION AND OPERATION--
CALIENTE RAIL LINE IN LINCOLN, NYE,
AND ESMEERALDA COUNTIES, NEVADA

UNITED STATES DEPARTMENT OF ENERGY'S
REPLY TO THE
STATE OF NEVADA'S MOTION FOR LEAVE TO AMEND MOTION TO REJECT
DOE'S APPLICATION, or alternatively, TO REQUIRE RESPONSIVE COMMENTS
ONLY AFTER APPLICATION HAS BEEN FULLY COMPLETED BY PROPER
SUPPLEMENT and REQUEST FOR ORAL ARGUMENT

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For the reasons stated below, the United States Department of Energy ("DOE") respectfully requests that the Surface Transportation Board ("Board" or "STB") deny Nevada's "Motion for Leave to Amend Motion to Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed by Proper Supplement, and Request for Oral Argument" ("Motion for Leave"), filed on May 2, 2008.¹

I. BACKGROUND

On March 17, 2008, DOE filed an Application for a Certificate of Public Convenience and Necessity ("Application") with the Board. On April 2, 2008, Nevada filed a "Motion to Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Complete by Proper Supplement" ("Motion to Reject")

On April 10, 2008, the Board issued a Decision on Notice of Construction and Operation and Adoption of Procedural Schedule ("Decision"), served April 11, 2008. The Decision acknowledges receipt of DOE's Application and sets a schedule for interested parties to file notices of intent to participate in this proceeding and submit comments in support of or opposition to the Application. 73 Fed. Reg. 20748 (April 16, 2008)

¹ Appended to the Motion for Leave is the "Proposed State of Nevada's First Amended Motion to Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed by Proper Supplement" ("First Amended Motion to Reject"). If the Board were to grant Nevada's Motion for Leave, DOE requests an opportunity to reply on the merits to the First Amend Motion to Reject, pursuant to 10 C.F.R. § 1104.13(a), as well as to Nevada's request for oral argument which should also be denied.

Pursuant to 49 C.F.R. § 1104.13(a), DOE filed a Reply to Nevada's Motion to Reject ("DOE Reply") on April 22, 2008. The DOE Reply responded to the arguments in the Motion to Reject.

In response to the DOE Reply, Nevada filed its Motion for Leave on May 2, 2008. Nevada seeks through the Motion for Leave permission to file a First Amended Motion to Reject. The First Amended Motion to Reject purports to reply to arguments in the DOE Reply.

II. ARGUMENT

The Board should deny Nevada's Motion for Leave. The Motion for Leave is an attempt to file an impermissible reply to a reply, in violation of the Board's regulations. Nevada also fails to show good cause for the requested amendment.

A. Nevada Seeks Leave To File An Impermissible Reply To A Reply

The Board's procedural regulations, in 49 C.F.R. § 1104.13, prescribe two basic filings only. Specifically, they contemplate "a reply or a motion addressed to any pleading." 49 C.F.R. § 1104.13(a). Those regulations expressly provide further: "A reply to a reply is not permitted." 49 C.F.R. § 1104.13(c).

In contravention of those provisions, Nevada's Motion for Leave seeks to file what is, in essence, an impermissible reply to the DOE Reply. This is made plain in the Motion for Leave itself. Nevada states there, "*Based on DOE's April 22, 2008 Reply to Nevada's original motion*, Nevada now requests permission to amend its motion." Motion for Leave at 3 (emphasis added). Nevada also states, "... Nevada's motion for leave to do so is in timely response to DOE's April 22 Reply to Nevada's original motion

" *Id* (emphasis added) Nevada then proceeds to identify several arguments in the DOE Reply to which it seeks to reply *Id* at 6 ("In its April 22, 2008 Reply to Nevada's original motion, DOE relies solely on) & *id* ("In its Reply, DOE ignores the fact) & 7 ("DOE now states ," citing DOE Reply at 5) & *id* ("DOE argues that ," citing DOE Reply at 6-7)

As such, the pleading that Nevada seeks to file is expressly prohibited by the Board's regulations. The requested filing is in substance a "reply to a reply," and Nevada ought not to be allowed to evade the regulatory prohibition on such submittals by labeling its requested pleading an "amended motion" rather than a "reply to a reply." Substance should prevail over form.

B Nevada Has Not Shown Good Cause

Even assuming Nevada were requesting a proper amendment--which it is not--the Motion for Leave makes no showing of good cause to warrant the exercise of the Board's discretion to allow an amendment under 49 C.F.R. § 1104.11. The Motion for Leave summarizes the arguments that Nevada seeks to add to its Motion to Reject; however, Nevada does not explain why it omitted those arguments from the Motion to Reject, much less demonstrate good cause for that omission.

More particularly, Nevada seeks to expand its jurisdictional argument on the ground that the DOE Reply allegedly identifies 49 U.S.C. § 10901 as a basis for the Board's jurisdiction over the Application. Motion for Leave at 1. However, this is not a new matter raised by the DOE Reply. The Application itself identifies that statutory basis. See Application at 1, citing 49 U.S.C. § 10901. Nevada was on notice of this

matter from its receipt of the Application and could have, and should have, included this issue in its Motion to Reject if it believes that it provides a legitimate ground for dismissing the Application

Nevada additionally seeks to augment its jurisdictional argument with citations to holdings from several other proceedings. See Motion for Leave at 7-8, First Amended Motion to Reject at 7-8. All those decisions pre-date the Motion to Reject by at least two years, and in many cases several years. Nevada does not explain why it did not include these long available citations in its Motion to Reject and why it should be allowed to add them now.

Regarding its NEPA argument, Nevada seeks to supplement its Motion to Reject with the proposition that the Pipeline and Hazardous Materials Safety Administration (PHMSA), Federal Railroad Administration (FRA) and Transportation Security Administration (TSA) must be cooperating agencies, with the FRA as the lead agency on safety and security issues. Nevada premises its new argument on coordinated rulemaking in that area among the PHMSA, FRA, and TSA, including a 27-part risk assessment analysis for existing railroads included in recent interim regulations of the PHMSA. Motion for Leave at 4-5, First Amended Motion to Reject at 17-20.

That coordinated rulemaking, however, was long underway when Nevada filed the Motion to Reject, and indeed is discussed in the Motion to Reject. See Motion to Reject at 13-14. The risk assessment analysis in particular was contained in a proposed rule that was issued in 2006, see 71 Fed. Reg. 76834 (Dec. 21, 2006) at 76835-39 (involvement of TSA, PHMSA, FRA) & 76849 App. D (27-factor checklist), and the Motion to Reject refers to that assessment too. See Motion to Reject at 14. So in

addition to the fact that Nevada never explains why this NEPA issue provides any basis for rejecting the Application, Nevada was aware of the basis for this argument when it filed the Motion to Reject and could have, and should have, raised it in the Motion to Reject if it had any validity

In short, the arguments that Nevada seeks to raise in its First Amended Motion to Reject were available when Nevada filed its Motion to Reject. Nevada should be estopped from untimely modification of pleadings to adduce arguments that were available when Nevada filed its Motion to Reject.

III. CONCLUSION

Nevada's Motion for Leave adds no legitimate new material and is an attempt to circumvent Board rules and raise new arguments that could have and should have been addressed in its initial motion. Nevada's Motion for Leave appears to have little function other than to create artificial procedural complexity for this proceeding. To the extent that Nevada has comments in opposition to DOE's Application, those comments can be filed in accordance with the Board's April 10 Decision.

For the reasons stated above, DOE respectfully requests that the Board (1) deny Nevada's Motion for Leave, (2) not accept the First Amended Motion for filing and consideration, and (3) decide the initial Motion to Reject on the basis of the existing pleadings. In the event that the Board grants leave to file the First Amended Motion to Reject, DOE respectfully requests an opportunity to reply on the merits to that pleading, as well as the request for oral argument. DOE also respectfully requests that DOE's reply time run from the date of notification of any such decision granting leave.

Respectfully submitted,

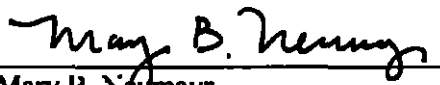
A handwritten signature in black ink, appearing to read "Mary B. Neumayr", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Mary B Neumayr, hereby certify that I caused to be served a true and correct copy of the Department of Energy's "Reply to the State of Nevada's Motion for Leave to Amend Motion to Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed by Proper Supplement and Request for Oral Argument" in the matter of STB Finance Docket No 35106 on the parties identified on the attached list by first-class mail or more expedient service this 19th day of May 2008



Mary B Neumayr
Deputy General Counsel
for Environment & Nuclear Programs

May 19, 2008

UNITED STATES OF AMERICA

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No 35106

UNITED STATES DEPARTMENT OF ENERGY
--RAIL CONSTRUCTION AND OPERATION--
CALIENTE RAIL LINE IN LINCOLN, NYE,
AND ESMERALDA COUNTIES, NEVADA

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